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February 22, 2019

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: Written *Ex Parte* Presentation by AmeriFactors Financial Group, LLC  
CG Docket Nos. 02-278 and 05-338

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Federal Communications Commission's ("FCC's" or "Commission's") rules, the undersigned counsel for AmeriFactors Financial Group, LLC ("AmeriFactors") hereby submits this letter concerning AmeriFactors' Petition of Expedited Declaratory Ruling filed July 13, 2017 in the above-captioned proceedings ("Petition"). The Commission received comment on the AmeriFactors Petition in August and September of 2017, and the Petition is ripe for resolution.

By this submission, AmeriFactors urges the Commission to grant the Petition and declare that "fax" advertisements the recipient receives through online facsimile services or on a device other than a "telephone facsimile machine" are not subject to the Telephone Consumer Protection Act of 1991 ("TCPA"). As explained further herein, the ruling by the D.C. Circuit in *ACA International v. FCC* underscores the importance of acknowledging the limitations of the scope of the TCPA and the need for the FCC to set forth clear rules of the road for parties to avoid needless and costly litigation. Moreover, the FCC's own empirical evidence demonstrates that it is high time for the FCC to acknowledge that technological advances have greatly displaced traditional facsimile machines of the past, and that "online fax services" such as those

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described in the Petition<sup>1</sup> do not cause the types of harm to consumers that the TCPA and Junk Fax Prevention Act of 2005 (“JFPA”) were intended to address. Finally, the district court hearing the complaint against AmeriFactors has granted a stay through March 28, 2019 to allow for FCC input on this important question.<sup>2</sup> AmeriFactors urges the Commission to provide guidance as soon as possible.

**The Commission Should Acknowledge the Limits of the TCPA in Light of Advances in Facsimile Technology**

In 2018, the U.S. Court of Appeals for the D.C. Circuit overturned much of the FCC’s 2015 TCPA Declaratory Ruling<sup>3</sup> as arbitrary and capricious.<sup>4</sup> While the decision did not address facsimile issues, several of the issues in *ACA International* parallel questions that are present in the facsimile provisions of the TCPA. In particular, the D.C. Circuit was appropriately skeptical of the suggestion that the FCC may “update” the TCPA to address equipment not covered by the statute’s text. In its discussion of the FCC’s interpretation of the term “automatic telephone dialing system,” the court astutely observed:

Congress need not be presumed to have intended the term automatic telephone dialing equipment to maintain its applicability to modern phone equipment in perpetuity, regardless of technological advances that may render the term increasingly inapplicable over time. After all, the statute also generally prohibits nonconsensual calls to numbers associated with a ‘paging

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<sup>1</sup> Online fax services offer users the ability to both send and receive “faxes” using cloud-based servers. Users access the fax services via the Internet or a dedicated IP connection. For outbound faxes, the user can send a document from many common software programs, including email, word processing programs, presentation programs, and scanning equipment such as digital scanners or digital copy machines. For inbound faxes, the user can acquire a new number or port its existing fax number for such purpose. Inbound faxes are held in digital form at the cloud-based server, where the user accesses the document via the online portal or via an email attachment sent to the user’s email account. Either way, the user does not automatically print the fax, and need not ever print a fax.

<sup>2</sup> See Text Order, *Career Counseling, Inc. v. AmeriFactors Fin. Grp., LLC et al.*, No. 3:16-cv-03013 (D.S.C. Sept. 28, 2018), ECF No. 88.

<sup>3</sup> See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) (“2015 TCPA Declaratory Ruling”).

<sup>4</sup> *ACA Int’l. v. FCC*, 885 F.3d 687 (D.C. Cir. 2018).

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service’ or ‘specialized mobile radio service,’ ... yet those terms have largely ceased to have practical significance.<sup>5</sup>

This logic is equally applicable to facsimile technology. As AmeriFactors explained in its Petition – and as multiple commenters confirmed – technological advances have largely replaced the “telephone facsimile machine” and rendered that term in the TCPA obsolete. Few people today even engage in “faxing” and when they do, the term is largely used to describe an exchange that does not involve the equipment of 1991. Rather, the traditional, stand-alone fax machine – complete with its dedicated lines, slow transmission speeds and mandatory printing capabilities – has been replaced for all but a small number of consumers. Today’s consumers receive “faxes” not on a traditional telephone facsimile machine but via a computer, as an email service. “Faxing” continues as a term despite this technological change much as telephone users “dial” a number despite the long-ago retirement of rotary dial telephones and of analog telephone service.<sup>6</sup>

This substitution is not news to the Commission. Indeed, the FCC has repeatedly acknowledged in its reports to Congress that technological advances have greatly displaced traditional facsimile machines of the past, and has provided the following explanation of the demise of the “telephone facsimile machine:”

The decline in fax complaints follows in lockstep with Americans’ shift away from fax transmission to other forms of document sharing via the Internet; some estimate that as few as 3% of American households have a device capable of receiving faxes. Moreover, as Americans abandon landline telephone service for wireless-only service, consumer use of fax machines will probably continue to decline.<sup>7</sup>

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<sup>5</sup> *ACA Int’l.* at 699.

<sup>6</sup> There are a great many terms which have become overtaken by technology, but which are still used in common language, such as “tuning” to a radio station, “taping” movies or shows, and “carbon copying” or “cc’ing” someone on a message. *See* Yohana Desta, “9 Old-Fashioned Tech Terms You Still Use Today,” Mashable (Mar. 4, 2014), *available at* <https://mashable.com/2014/03/04/old-tech-terms/#5cKLGWYg9Eqw>. Increasingly, “receiving a fax” falls into the same category.

<sup>7</sup> *See, e.g.*, Federal Communications Commission, Enforcement Bureau, Report on Unsolicited Facsimile Advertisements, at 2 (May 2, 2018) (“2018 Report on Unsolicited Facsimile Advertisements”) (attached hereto as **Exhibit A**); *see also* Federal Communications Commission, Enforcement Bureau, Report on Unsolicited Facsimile Advertisements, at 2 (May 12, 2016).

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Therefore, just as the D.C. Circuit cautioned the FCC in *ACA International*, the FCC cannot presume that “telephone facsimile machines” will exist in perpetuity. When technology has changed, the FCC must acknowledge that change. As Chairman Pai noted in his dissent in the 2015 TCPA Declaratory Ruling, when discussing the changes in automated dialing equipment:

If callers have abandoned that equipment, then the TCPA has accomplished the precise goal Congress set out for it. And **if the FCC wishes to take action against newer technologies beyond the TCPA’s bailiwick, it must get express authorization from Congress—not make up the law as it goes along.**<sup>8</sup>

The FCC should follow Chairman Pai’s guidance in this matter. As explained in the Petition, “faxes” received via online fax services are not received on a “telephone facsimile machine” as defined in the TCPA.<sup>9</sup> At this point, most Americans have migrated away from facsimile transmissions in favor of email, texting, instant messaging and other forms of document sharing. Those that maintain a “fax” presence are increasingly relying upon cloud-based online fax services to replace the telephone facsimile machine technology.

With this technological displacement has come the disappearance of the harms that underlie the fax advertising restrictions of the TCPA. As explained in the Petition, “faxes” received via online fax services do not impose the cost of ink or paper on recipients and do not “tie up” telephone lines, as was the case with facsimile equipment in 1991.<sup>10</sup> These services also do not use a “regular telephone line” as part of the transmission. Therefore, modern fax services do not fit within the scope of the TCPA. AmeriFactors asks the FCC to respond to those changes and to stem the expansion of the TCPA being carried out by a small but determined cadre of professional TCPA plaintiffs and class action law firms<sup>11</sup> by declaring that the TCPA means

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<sup>8</sup> 2015 TCPA Declaratory Ruling, Dissenting Statement of Commissioner Ajit Pai (emphasis added); *cf. id.*, Dissenting Statement of Commissioner Michael O’Rielly (“The Commission should have had gone back to Congress for clear guidance on the [whether the TCPA applies to text messages] rather than shoehorn a broken regime on a completely different technology.”).

<sup>9</sup> 47 U.S.C. § 227(a)(3) (definition of “telephone facsimile machine”); *See* Petition at 12-16.

<sup>10</sup> *See* Petition at 16-19.

<sup>11</sup> Indeed, the Seventh Circuit aptly observed in 2016 “the pervasive nature of junk-fax litigation is best explained this way: it has blossomed into a national cash cow for plaintiff’s attorneys specializing in TCPA disputes. ... We doubt that Congress intended

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what it says when it limits its scope to transmissions received on a “telephone facsimile machine” and does not reach transmissions received by online fax services that only mimic the old facsimile capability.

AmeriFactors submits that this conclusion will not increase the incidence of unwanted facsimile advertisements, nor would it leave consumers of online fax services without remedies to police unwanted communications. The trends noted by the FCC in the 2018 Report on Unsolicited Facsimile Advertisements are likely to continue to erode the use of facsimile technology, even if the FCC acknowledges that some services are not within the scope of the TCPA. With respect to users of online facsimile services, if the FCC concludes that the CAN-SPAM Act applies to such communications, then remedies under that statute are available to consumers.

AmeriFactors appreciates that robocalling is a top consumer complaint to the FCC, and that the TCPA is a key tool for the FCC to address this issue. However, available FCC data makes clear that junk faxing is *not* a part of that concern with robocalling. Indeed, in the 2018 Report on Unsolicited Facsimile Advertisements, the FCC noted that *junk fax complaints had declined by nearly 95% from their peak during 2007-2008*.<sup>12</sup> In fact, faxing complaints between May 2017 and April 2018 averaged only 260 complaints per month.<sup>13</sup> Put simply, junk faxing is being relegated to a minor nuisance, a problem solved by the advance of technology and migration of consumer preferences. In short, in Chairman Pai’s words from 2015, “the TCPA has accomplished the precise goal Congress set out for it” in this instance.<sup>14</sup> All that is left is for the Commission to acknowledge this transformation by clarifying that the TCPA means what it says when it defines a “telephone facsimile machine.”

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For the reasons discussed above, AmeriFactors respectfully requests that the FCC move quickly to grant its Petition and declare that fax advertisements the recipient receives through online fax services or on a device other than a “telephone facsimile machine” are not

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the TCPA, which it crafted as a consumer-protection law, to become the means of targeting small businesses. Yet in practice, the TCPA is nailing the little guy, while plaintiffs’ attorneys take a big cut.” *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (internal citations and quotations omitted).

<sup>12</sup> 2018 Report on Unsolicited Facsimile Advertisements, at Appendix (unnumbered page).

<sup>13</sup> *Id.*

<sup>14</sup> 2015 TCPA Declaratory Ruling, Dissenting Statement of Commissioner Ajit Pai.

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subject to the TCPA. The court in the AmeriFactors case has temporarily halted the case, pending input from the FCC. With the court's initial stay set to expire next month, AmeriFactors urges the Commission to act promptly on its July 2017 Petition.

Sincerely,



Steven A. Augustino

*Counsel for AmeriFactors Financial Group,  
LLC*

cc: Z. Nakazawa  
K. Schroeder  
N. Stevenson